

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 9, 2009

ARTHUR PIRTLE v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Marshall County
No. 2008-CR-10 Robert Crigler, Judge

No. M2009-00347-CCA-R3-PC - Filed March 17, 2010

The petitioner, Arthur Pirtle, appeals the denial of post-conviction relief by the Circuit Court for Marshall County from his conviction for possession of more than .5 grams of a Schedule II controlled substance, a Class B felony. He received a sentence of twenty-seven years in the Tennessee Department of Correction as a Range III, persistent offender. The petitioner argues that (1) he was denied his right to trial by jury because the trial court applied enhancement factors without a factual determination by a jury; and (2) he was denied effective assistance of counsel because trial counsel (a) failed to object to the trial court's sentencing the petitioner under the 2005 amendments to the sentencing act, (b) failed to object to the trial court's application of enhancement factors that had not been determined by a jury, and (c) failed to object to the trial court's application of an enhancement factor premised on the petitioner being on probation when the petitioner was not on probation at the time of the crimes. The post-conviction court denied relief. After review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

S. Craig Moore, Fayetteville, Tennessee, for the appellant, Arthur Pirtle.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Weakley E. Bernard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

After a trial in June 2006, a jury convicted the petitioner of possession of a Schedule II controlled substance but acquitted him of simple possession. The trial court found that the petitioner was a Range III, persistent offender, and sentenced the petitioner to twenty-seven years in the Tennessee Department of Correction. The petitioner appealed, arguing that the evidence was insufficient to support his conviction. *See State v. Arthur Pirtle*, No. M2006-02283-CCA-R3-CD, 2007 WL 1836046, at *1 (Tenn. Crim. App., at Nashville, June 27, 2007), *perm. app. denied* (Tenn. Sept. 24, 2007). The following is a summary of the facts of this case taken from this court's opinion on direct appeal:

At trial, Detective Dac Burrow of the Lewisburg Police Department testified that on March 5, 2004, he was assisting the Seventeenth Judicial District Drug Task Force in the execution of a search warrant. Prior to the execution of the warrant, he and several other Task Force members had conducted surveillance at the residence, located at 834 Tankersley Street in Lewisburg, Marshall County. Detective Burrow testified that he witnessed several persons going in and out of the residence, with many of these persons staying less than five minutes. Detective Burrow testified that several of the persons visiting the house were known drug users. In most instances, the front door of the residence was left open, and the persons would go in without knocking.

On the evening of March 5, Detective Burrow and Drug Task Force Agent Shane George entered the residence and found several individuals in the kitchen: Jikinte Morris, David Burden, and the [petitioner], Arthur Pirtle. Detective Burrow testified that when he and Agent George searched the [petitioner], they found \$616.00 in his front pocket and a bag containing 1.8 grams of crack cocaine in his shoe. The agents who searched the residence also found marijuana and crack cocaine hidden behind the water heater in the residence's utility room. This testimony was corroborated by the testimony of Agent George.

Deputy Bart Fagan with the Marshall County Sheriff's Department testified that he assisted with the surveillance and execution of the search warrant at the Tankersley Avenue residence. Deputy Fagan testified that during his surveillance of the home, he observed several people coming and going from the residence, with most of the visitors staying only a few minutes at a time.

Drug Enforcement Agency (DEA) Agent James Whitsett, who was employed as a detective with the Lewisburg Police Department the day the search warrant was executed, testified that in the weeks leading to the [petitioner's] arrest, he had personally performed "well over 100" hours of surveillance on the Tankersley Street residence. Based on rental records, the Drug Task Force knew that the [petitioner] was leasing the residence. During his surveillance, he witnessed several known drug users exchanging what appeared to be crack cocaine for money in front of the house. He also witnessed the [petitioner] meet several visitors [at] the house and lead them inside, with the visitors emerging from the house a short time later. Detective Whitsett testified that after the [petitioner] was arrested, he and Drug Task Force Agent Tim Miller advised the [petitioner] of his rights. The [petitioner] then voluntarily stated that he wished to talk to the officers. The [petitioner] told the officers that Morris supplied him with three "eight balls" (each eight ball weighing approximately 3.5 grams) of cocaine each week, and that the [petitioner] used the proceeds of the drug sales to repay Morris for the drugs. The [petitioner] told the officers that he purchased \$200.00 worth of cocaine (roughly 3.5 grams) on March 4, and that the cocaine found in his shoe was the remainder of that purchase, which he had not yet sold. Agent Miller's testimony regarding the [petitioner's] arrest and statements to police corroborated the testimony offered by Detective Whitsett.

The [petitioner] testified that on the night of his arrest, he was living in the Tankersley Road residence along with two other individuals, Burden and Yolanda Cross. He claimed that at the time of his arrest, he did not know that there were any drugs in the house; he claimed that the first time he saw drugs in the house was the night of the arrest, when Burden put some cocaine on a table when the police arrived. According to the [petitioner], he placed this bag of crack cocaine in his shoe to keep the police from finding it. The [petitioner] testified that he told the police that he had purchased \$200.00 worth of cocaine the day before he was arrested, but that he intended to use the drugs himself, not sell them. On cross-examination, he also denied telling the police that he had ever sold drugs for Jikinte Morris. Finally, the [petitioner] testified that the \$616.00 the police found in his pocket was comprised of \$300.00 he had earned from his job at Tow Joe's Lumber Company, \$300.00 that Burden and Cross had given him for rent and household expenses, and \$16.00 of his own money.

Id. at *1-2 (footnotes omitted). This court found that the evidence was sufficient to find the petitioner guilty beyond a reasonable doubt and affirmed the judgment of the trial court. *Id.* at *1.

On February 4, 2008, the petitioner filed for post-conviction relief, arguing that he received ineffective assistance of counsel at sentencing and that the trial court committed plain error in its sentencing. The post-conviction court held a hearing on the merits of the petition on January 2, 2009. The following testimony was presented at the post-conviction hearing.

The petitioner testified that he discussed the change in the sentencing laws with counsel and expressed that he wished to be sentenced under “the other law and not the new law.” The petitioner stated that he was not on probation in March 2004. He testified that in 2003 and 2004, he worked for a man named Mr. Tow Joe. The petitioner told counsel that he needed Mr. Joe to testify at his trial to verify that the petitioner worked for him, but counsel did not agree that Mr. Joe’s testimony was necessary.

On cross-examination, the petitioner was unclear when he discussed the changes in the sentencing law with counsel. He said that he believed the old law would be beneficial to him based on what a paralegal had told him. The petitioner recalled testifying at trial that Mr. Joe had given him \$300 and that two other people gave him another \$300, but he only asked counsel whether Mr. Joe should testify and did not request that the other two people testify on his behalf. The petitioner said that he thought Mr. Joe’s real name was Hargrove, and if he had needed to find him, he knew someone who could get in touch with Mr. Joe.

Counsel testified that he did not recall discussing the change in the sentencing scheme with the petitioner. He said that he was familiar with the Tennessee Supreme Court’s ruling in *Gomez I* and the 2005 amendments to the sentencing statutes prior to the petitioner’s sentencing hearing. Counsel said the discussions he had with the petitioner concerning sentencing centered on whether the petitioner was a Range II or Range III offender. He stated that he read the petitioner’s presentence report and believed the petitioner was on probation in March 2004. Counsel admitted “that was in error probably.”

The post-conviction court found that the trial court sentenced the petitioner under the pre-2005 sentencing scheme, and counsel was therefore not ineffective in that regard. The post-conviction court further found that while the petitioner was not on probation in March 2004, the petitioner was either released on bail or on pre-trial release; therefore, enhancement factor thirteen was still applicable, namely that the petitioner was released on bail or on pre-trial release. Additionally, the post-conviction court found that counsel did not provide

ineffective assistance when he did not present Mr. Tow Joe as a witness at trial. The court denied the petition for post-conviction relief.

Analysis

Standard of Review

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings is *de novo* with a presumption that the findings are correct. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). Our review of the post-conviction court's legal conclusions and application of law to facts is *de novo* without a presumption of correctness. *Id.*

1. Ineffective Assistance

The petitioner first contends that he received ineffective assistance of counsel at sentencing. Specifically, he argues that his counsel was ineffective because counsel did not object when the trial court sentenced the petitioner under the sentencing statutes as amended in 2005 and applied enhancing factors that had not been determined by a jury and, in one instance, was based on an error in his presentence report. The state responds that the petitioner was actually sentenced under the pre-2005 sentencing statutes, that counsel provided effective assistance under the law as it stood when the petitioner was sentenced, and if counsel's assistance was ineffective, the petitioner has not shown prejudice.

To establish ineffective assistance of counsel, the petitioner must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.* at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn.

1996). Also, a fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad*, 938 S.W.2d at 369. However, deference is given to strategy and tactical decisions only if the decisions are informed ones based upon adequate preparation. *Id.* (citations omitted).

The petitioner claims that the trial court sentenced him under the amended sentencing statutes without a waiver from the petitioner. A waiver is required to sentence a defendant under the amended statutes when a defendant committed a crime prior to the enactment of the amended statutes but was sentenced after enactment. *See State v. Osborne*, 251 S.W.3d 1, 23-24 (Tenn. Crim. App. 2007). The petitioner argues that his counsel provided ineffective assistance when he did not obtain such a waiver from the petitioner. The post-conviction court, however, found that the trial court had sentenced the petitioner under the pre-2005 law. Also, the sentencing hearing transcript reveals that counsel conveyed to the trial court that the petitioner wished to be sentenced under the pre-2005 law. Because the trial court sentenced him under the pre-2005 law, we conclude that there was no need to obtain a waiver. As such, the petitioner's claim is without merit, and he is not entitled to relief on this issue.

Secondly, the petitioner claims that counsel was ineffective because he failed to object to the trial court's application of enhancement factors that had not been factually determined by a jury nor did counsel raise the issue on appeal. At the time of the petitioner's sentencing, the Tennessee Supreme Court's opinion in *State v. Gomez (Gomez I)*, 163 S.W.3d 632 (Tenn. 2005), which held that Tennessee's sentencing statutes were in line with the Sixth Amendment of the federal constitution, was still good law. *Gomez I*, 163 S.W.3d at 661. It was not until October 2007 that the Tennessee Supreme Court ruled that "to the extent the Reform Act permitted enhancement based on judicially determined facts other than the fact of a prior conviction, it violated the Sixth Amendment as interpreted by the Supreme Court in *Apprendi*, *Blakely*, and *Cunningham*." *State v. Gomez (Gomez II)*, 239 S.W.3d 733, 740 (Tenn. 2007) (*citing Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *Cunningham v. California*, 549 U.S. 270 (2007)). Counsel testified that he was knowledgeable about the then-existing status of Tennessee's sentencing law when the petitioner was sentenced. Furthermore, counsel would not have had the opportunity to base his appeal on *Gomez II* because the petitioner's appeal was finalized before the supreme court handed down that opinion. Because we evaluate counsel's performance "at the time" of the performance, we conclude that the petitioner has not shown that counsel's

conduct was substandard. *See Strickland*, 466 U.S. at 689. Therefore, the petitioner is without relief on this issue.

The petitioner further claims that counsel was ineffective because he did not object to the trial court's application of an enhancement factor that was premised on the fact that the petitioner was on probation when he committed the charged crime. The petitioner argues that if counsel had consulted him about his presentence report, counsel would have recognized that the presentence report incorrectly indicated that the petitioner was on probation at that time. The state responds that the petitioner has not shown that he was prejudiced by counsel's conduct.

Counsel testified that he did not discuss the presentence report with the petitioner and did not recognize the error regarding the petitioner's probation status. The post-conviction court found that, even if the petitioner had not been on probation, the facts of the case nonetheless supported the application of the enhancement factor because the petitioner was either released on bail or on pre-trial release at the time of the crime. The petitioner has not shown that he would have received a different sentence but for counsel's error. We conclude, therefore, that the petitioner has not carried his burden of proving both prongs of the ineffective assistance test and is not entitled to relief on this issue.

2. Plain Error

The petitioner contends that the trial court committed plain error by applying judicially determined enhancement factors. Relying on the supreme court's opinion in *Gomez II*, the petitioner argues that he was denied the right to a trial by jury when the trial court enhanced his sentence based upon facts, other than prior convictions, that had not been determined by a jury. The state responds that the supreme court's holding in *Gomez II* does not apply retroactively to cases on collateral review.

An error which has affected the substantial right of a defendant may be noticed at any time in the discretion of the appellate court where necessary to do substantial justice. *State v. Taylor*, 992 S.W.2d 941, 944 (Tenn. 1999). "Plain error" or "fundamental error" is recognized under Tennessee Rule of Criminal Procedure 52(b). *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). Some errors are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

There are five factors which must be present for a court to determine "plain error" exists:

- (a) the record must clearly establish what occurred in the trial court;

- (b) a clear and unequivocal rule of law must have been breached;
- (c) a substantial right of the accused must have been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is “necessary to do substantial justice.”

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (citing *Adkisson*, 899 S.W.2d at 641-42). Complete consideration of all five factors is unnecessary if at least one is absent. *Id.* at 283. Furthermore, the plain error must be such that it probably changed the outcome of the trial. *Adkisson*, 899 S.W.2d at 642.

Tennessee courts have repeatedly held that *Gomez II* does not apply retroactively to cases on collateral review. *See, e.g., Bobby Taylor v. State*, No. M2008-00335-CCA-R3-PC, 2009 WL 2047331, at *2 (Tenn. Crim. App., at Nashville, July 14, 2009), *perm. app. denied* (Tenn. Oct. 19, 2009); *Ortega Wiltz v. State*, No. M2006-02740-CCA-R3-CD, 2008 WL 1850796, at *9 (Tenn. Crim. App., at Nashville, Apr. 25, 2008), *perm. app. denied* (Tenn. Oct. 27, 2008); *Billy Merle Meeks v. Ricky J. Bell, Warden*, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486, at *7 (Tenn. Crim. App., at Nashville, Nov. 13, 2007), *perm. app. denied* (Tenn. Apr. 7, 2008). Because *Gomez II* cannot be applied retroactively to this case, we conclude that no clear and unequivocal rule of law has been breached. Therefore, the petitioner’s claim is without merit, and he is not entitled to relief.

Conclusion

Based on the foregoing reasons, we affirm the post-conviction court’s denial of relief.

J.C. McLIN, JUDGE